

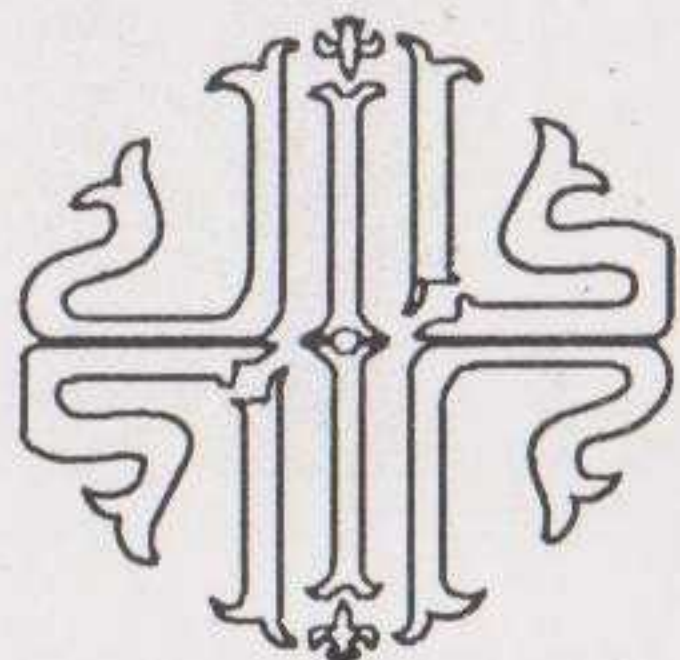
JOURNAL OF INDONESIAN ISLAM



PLURALISM, *FATWĀ*, AND COURT IN INDONESIA
the Case of Yusman Roy
Nadirsyah Hosen

ISLAMIST PARTY, ELECTORAL POLITICS AND DA'WA.
MOBILIZATION AMONG YOUTH
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TOWARDS THE INDONESIAN LEGAL SYSTEM
Sukiati



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HAZAIRIN'S LEGAL THOUGHT AND HIS CONTRIBUTION TOWARDS THE INDONESIAN LEGAL SYSTEM

Sukiati

IAIN Sumatera Utara, Medan - Indonesia

Abstract: This paper discusses the thought and contribution of an Indonesian legal thinker, Hazairin, to the Indonesian legal system. It shows that Hazairin's dynamic contribution lies not only in his revolutionary reform but also in his ability to influence the policy makers in drawing the legal products. Standing against the might of the colonial legal legacy, Hazairin was insistent in his position that Islamic law should be regarded as one of the sources for national legal system. This is despite the fact that he is the product of the Western educational system. His ideas are a kind of an intermingling spot between Islamic law, *adat* law and—to some extent—Western law. These issues will be exposed by relating to the circumstances that shape his ideas, and the social structure as well as the characteristics of the *adat* laws. Of particular interest is to pay attention to his socio-anthropological interpretation of the Qur'ān, which is aimed at showing its compatibility with society's needs.

Keywords: Legal reform, *adat* law, *sharī'ah*.

Introduction

Hazairin has been acknowledged as a prominent figure in Islamic law and *adat* law.¹ His qualifications in Islamic law were not gained through formal study in any Islamic school; however he was an autodidact whose great work in Islamic law gained him authority in the field. Given this fact, he was not much respected during his lifetime by

¹ He was a professor on *adat* law and Islamic law in the University of Indonesia during the period 1952-1975.

Muslims for his work on Islamic law. His expertise in *adat* law, on the other hand, was indeed achieved through formal schooling in the Dutch government period. His dissertation on this subject raised him to the status of an authority. This paper provides a brief account of Hazairin's legal thought.

There were three major aspects to Hazairin's legal thought. First, there was his refutation of the legal heritage of Dutch colonial policy, known as his *receptie exit* theory. His proposal here was to put an end to the authority of *adat* law over Islamic law. Second, effectively a continuation of the first was his concept of a "bilateral system." This was a system of Islamic family law interpreted on the basis of the Qur'an and adapted to Indonesian conditions, especially in the spheres of marriage and inheritance law. Last, there was his proposal to institutionalize Islamic law at the state level.

This paper elucidates Hazairin's Islamic legal thought and the circumstances that shaped it. Its objective is to show how, in spite of being a product of the Dutch educational system, Hazairin recognized the value of Islamic law and the need to correlate it with *adat* law.

On the *Receptie Exit* Theory

The Dutch government recognized the pervasive influence of Islamic law within Indonesian society. This is stated in the legislation known as the *Regalment op het beleid der Regeering van Nederlandsch Indie* (RR or Rule of the Management of India Netherlands), *Stbl.* No. 129 of 1854 and No. 2 of 1855, and is explained more fully in Articles 75, 78 and 109.² Under the Daendels (1807-1811) and Raffles administrations (1811-1816)³, Islamic law was officially recognized in matters of personal law, recognition of its status in the hearts of the Indonesian people.⁴ One of the first to realize Islam's influence on Indonesian society was Carel Frederik Winter (1799-1859), a Dutch expert on Javanese culture and author of several studies on Islam in Indonesia. His research was followed up by Solomon Keyzer (1823-

² Sajuti Thalib, *Receptio A Contrario: Hubungan Hukum Adat dan Hukum Islam* (Jakarta: Academica, 1980), p. 7; Sajuti Thalib, "Receptio in Complexu, Theorie Receptie dan Receptio a Contrario," in *Pembaharuan Hukum Islam di Indonesia* (Jakarta: Universitas Indonesia Press, 1982), p. 44.

³ The latter was a British interregnum.

⁴ Arso Sostroatmodjo and Wasit Aulawi, *Hukum Perkawinan di Indonesia* (Jakarta: Bulan Bintang, 1981), pp. 11-2.

1868), a scholar of linguistics and culture in the Netherlands Indies, who translated the Qur'ān into Dutch and summarized Winter's conclusions.⁵

When it was realized how important Islamic law was to Indonesian society the Dutch government began to pay particular attention to the Islamic legal system. This led to two, essentially contradictory, developments. Initially, Islamic law came to occupy a more privileged position than *adat* law. This approach was supported by L. W. C. van den Berg (1845-1927),⁶ who had developed an interpretation of Islamic law based on his theory of *receptio in complexu*. Later, however, the view emerged that Islamic law should come under the authority of *adat* law. This interpretation was advanced by Christian Snouck Hurgronje (1857-1936)⁷ and was based on what he called the *receptie* theory.

The *receptio in complexu* theory acknowledged Islamic law as a positive law, fully implemented among the indigenous people.⁸ Van den Berg maintained that Islam had been fully accepted as the living law of the inhabitants of the Netherlands Indies.⁹ He came to this conclusion while working at the National Court of Semarang (Central Java) where he discovered the extent to which Islamic law was observed among the people, and as such believed that there was a need for it to be codified.¹⁰ His theory of *receptio in complexu* was officially

⁵ Winter concluded that the living law within the indigenous society was Islamic. Thalib, *Receptio A Contrario*, p. 5.

⁶ Van den Berg was the first Dutch scholar to be appointed as an advisor to the Dutch government regarding issues affecting Indonesian Muslims. He was also responsible for advising on the subject of eastern languages and Islamic law. Karel A. Steenbrink, "Foreword," in L. W. C. van den Berg, *Hadramaut dan Koloni Arab di Nusantara*, trans. Rahayu Hidayat (Jakarta: INIS, 1989), pp. xi-xxv.

⁷ Hurgronje was a Dutch scholar assigned as an advisor on Dutch policies towards Indonesian Muslims. He was born in Tholen City, Netherlands and studied theology and Arabic literature when he was young. His ambition to learn Arabic and study Islam led him to convert to Islam and perform ritual practices of Islam, but he is believed to have only pretended to be Muslim. For more information see for example, Danan Priyatmoko, "Christian Snouck hurgronje," in Nugroho et.al., (ed.), *Ensiklopedi Nasional Indonesia* (Jakarta: Cipta Adi Pustaka, 1989), pp. 505-6.

⁸ Thalib, "Receptio in Complexu," p. 45.

⁹ C. Van Vollenhoven, *Van Vollenhoven in Indonesian Adat Law*, trans. J. F. Holleman, Rachael Kalis, and Kenneth Maddock (The Hague: Martinus Nihoff, 1981), p. 20.

¹⁰ To this end he wrote "Mohammadenrecht" according to the Shafiite and Hanafite traditions, and a book on family law and inheritance law in which he studied its

recognized in Law No. 152 of 1882.¹¹ According to this legislation, the positive law for the indigenous people was to be their own religious law—In this case Islam—and accepted in full.¹² Van den Berg is considered to have recognized Islam's existence.¹³ In accordance with Van den Berg's policy, the Islamic courts continued their activities as religious institutions.¹⁴ The initiative was then undertaken to implement officially the provisions of Islamic law in colonial statutes such as the rules concerning inheritance (*farā'id*), marriage (*nikāḥ*) and divorce (*talāq*).¹⁵

However, the *receptie* theory of Snouck Hurgronje soon came to replace the *receptio in complexu* theory of Van den Berg. Hurgronje's theory did not admit the close ties to Islamic law felt by the Indonesian people. He maintained on the contrary that it was customary law that was still predominantly observed by society. Hurgronje therefore maintained that Islamic law ought not to be implemented unless it accorded with customary law. The positive law of Indonesian Muslims,

divergent trends in Javanese society. He then translated the book *Minhāj al-ṭalībīn* by Nawawi into French, to use as a legal reference tool in the religious court. Thalib, *Receptio A Contrario*, pp. 5-6. Steenbrink, "Foreword," pp. xiv-xv.

¹¹ Asro Sosroatmodjo and A. Wasit Aulawi, *Hukum perkawinan*, p. 13; Ichtijanto, "Pengembangan Teori Berlakunya Hukum Islam di Indonesia," in Tjun Surjaman (ed.), *Hukum Islam di Indonesia: Perkembangan dan Pembentukan* (Bandung: PT Remaja Rosdakarya, 1991), p. 120.

¹² Van Vollenhoven, *Van Vollen Hoven in Indonesia Adat Law*, p. 20. Hooker considered Islam to be an essential element of Indonesian society, affecting its political, social and cultural life. M. B. Hooker, *Islamic Law in Southeast Asia* (Singapore: Oxford University Press, 1984), p. 248.

¹³ B. J. Boland, *Struggle of Islam in Modern Indonesia* (The Hague: Martinus Nijhoff, 1962), p. 216. Taufik Abdullah, *Islam and Masyarakat: Pantulan Sejarah Indonesia* (Jakarta: LP3ES, 1987), p. 108.

¹⁴ The Islamic courts were founded by the early Muslim kings in different parts of Indonesia, which contributed to the spread Islam at the time. Under Dutch rule the Islamic courts survived expanded and won favor from Van Den Berg's policy. Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (Berkeley, Los Angeles and London: University of California Press, 1972), pp. 8-101; Hooker, *Islamic Law in Southeast Asia*, pp. 249-55; Steenbrink, *Beberapa Aspek Tentang Islam di Indonesia abad ke -19* (Jakarta: Bulan Bintang, 1984), pp. 213-33.

¹⁵ Ichtijanto, "Hukum Islam di Indonesia," p. 121.

hence, was seen as rooted in the customary law of the people, not in the religious law.¹⁶

Beginning with its official enactment in *Stbl.* No. 221 of 1929, Article 134 (2) of the *Wet op de staats Inriching van Nederlands Indie* (IS or the Law of the State Management of India Netherlands),¹⁷ the *receptie* theory replaced Van den Berg's *receptio* theory, and was to remain in effect for the next seventeen years.¹⁸ According to Thalib (b.1929), this regulation clearly determined that Islamic law could not be recognized as the positive law of Indonesian Muslims as long as local customary laws did not recognize it. In implementing his *receptie* theory, Hurgronje turned Van den Berg's theory upside down.¹⁹

Benda maintains that Hurgronje saw Islam as potentially a powerful religious or political force in Indonesia. His *receptie* theory therefore was a preventative measure. Unlike others, therefore, who have accused Hurgronje of opposing Islam as a religion, Benda argues that the enemy perceived by Hurgronje was not Islam the faith but Islam the political doctrine—one which could stir up local passions and lead to Pan-Islamism.²⁰

Hazairin, for his part, was strongly opposed to Hurgronje's *receptie* theory, which he believed had been assimilated into the Indonesian legal system of the post-independence period. He saw the Dutch intention as an attempt to minimize the role of Islam at every level of society and administration, if not eliminate it completely.²¹ This

¹⁶ Hooker, *Islamic law in South-East Asia*, p. 269. Daniel S. Lev, "Judicial Institutions and Legal Culture in Indonesia," in Claire Holt (ed.), *Culture and Politics in Indonesia* (Ithaca: Cornell University Press, n. d.), p. 254.

¹⁷ Thalib, *Receptio A Contrario*, pp. 27-9. Thalib, "Receptio in Complexu," pp. 50-1. Abdul Mutholib, *Kedudukan Hukum Islam Dewasa ini di Indonesia* (Surabaya: P.T. Bina Ilmu, 1984), p. 29.

¹⁸ Harry J. Benda, *The Crescent and the Rising Sun* (New York: Institute of Pacific Relations, n. d.), p. 20.

¹⁹ Thalib, *Receptio A Contrario*, p. 29.

²⁰ Harry J. Benda, "Christian Snouck Hurgronje," pp. 63-4. On Hurgronje's refutation of Pan-Islamism, see Hamid al-Gadri, *Dutch Policy Against Islam*, pp. 82-110.

²¹ Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas, 1982), p. 7. Hazairin, "Negara Tanpa Penjara," in Hazairin, *Tujuh Serangkai Tentang Hukum* (Jakarta: Tintamas, 1974), pp. 25-6. Yahya Harahap, "Praktek Hukum waris Tidak Pantas Membuat Generalisasi," in Iqbal Abdurrauf Saimima (ed.), *Polemik Reaktualisasi Ajaran Islam* (Jakarta: Pustaka Panjimas, 1988), p. 126.

intention took the form of rules limiting the function of the Islamic courts, especially in cases of inheritance.²²

Hazairin remarks in one of his works that, especially in cases of inheritance, the influence of the *receptie* theory in Indonesian legal institutions is obvious:²³

Supporters of the reception theory pointed to the situation of the *adat* among Muslims, for example Muslims in Java, to whom Islamic inheritance rules were applied only if they went to an Islamic court, but who, if they divided an inheritance in the village, followed *adat* law. Look (said advocates of the reception theory): the *farā'id* law is not yet received by *adat* law and is therefore not the law that applies; therefore, Islamic courts must be separated from their jurisdiction over inheritance. And so there arose Islamic courts with competence only over *nikah*, *talak*, *rudjuk*, *mabar* and *wakaf*.²⁴

Hazairin tried to replace Hurgronje's idea by advancing his own *receptie exit* theory,²⁵ referring to *receptie* itself as "*teori iblis*" (the devil's theory).²⁶ He invited Indonesians thus to "exit" Hurgronje's theory, on the grounds that it was contrary to the Constitution of 1945 (Undang-undang Dasar 1945) and the five principles which served as the basis of the Indonesian state (Pancasila), which clearly stated that Indonesian law should be based on religious belief.²⁷ Moreover, Hurgronje's theory, according to Hazairin, conflicted with the

²² The Islamic courts, according to Arifin, are based on the *devide et impera* (a slogan that is believed to prevent the unity of Indonesian society) of the Dutch government. Bustanul Arifin, *Perkembangan Hukum Islam di Indonesia* (Jakarta: Gema Insani Press, 1996), p. 48.

²³ Hazairin, *Hukum Kekeluargaan Nasional*, p. 8.

²⁴ Cited in Lev, *Islamic Courts in Indonesia*, p. 197.

²⁵ Hazairin, *Tujuh Serangkai Tentang Hukum*, p. 95. Ictijanto, "Hukum Islam di Indonesia," p. 101.

²⁶ Hazairin, *Tujuh Serangkai Tentang Hukum*, p. 95. Thalib. "Receptie in Complexu," p. 52; Deliar Noer, *Administration of Islam in Indonesia* (Ithaca: Cornell University Press, 1978), p. 47; Lev, *Islamic Courts in Indonesia*, p. 197. Hazairin tried to explain why he named it *teori iblis* or Satan theory by speaking ironically on behalf of *adat* as follows: "O Muslims, even though the Qur'ān prohibits the adultery on pain of criminal sanction, don't worry about committing adultery as long as by the *adat* of your society adultery is still a matter of choice..." Hazairin, *Hukum Kekeluargaan Nasional*, pp. 6-9.

²⁷ Ictijanto, "Hukum Islam di Indonesia," p. 100 and pp. 128-31.

principles laid down in the Qur'ān and Sunna.²⁸ Undoubtedly, Hazairin was against Hurgronje's theories as representative of a colonist mentality and as part of legacy that should be jettisoned by an independent Indonesia; significantly he found an Islamic justification for doing it.

Furthermore, for Hazairin, the *receptie* theory only encouraged people to set themselves against the will of society.²⁹ He reasoned that *receptie* theory gave an opportunity to people to adopt *adat* practices that might be forbidden by religion.³⁰ If *receptie* theory was still a feature of the Indonesian legal system, Hazairin declared, this meant Indonesian Muslims were not comprehensively applying Islamic teachings.³¹ Hazairin was then one of the first scholars to demonstrate systematically how Indonesia's legal structure was in large part, if not entirely, a legacy of the Dutch period.

Among the documents that Hazairin considered a rejection of *receptie* theory was the "Piagam Jakarta" (Jakarta Charter) of 22 June 1945.³² Seven words in the Charter, for him, invalidated the effects of *receptie*: "*dengan kewajiban menjalankan syari'at Islam bagi pemeluknya*" (with the obligation to carry out *shari'a* Islam for its adherents).³³ Moreover, he argued that the Constitution of 1945 contained Islamic elements which effectively over-rode *receptie* theory.³⁴ Indeed, Hazairin states that obedience to the 1945 Constitution is obedience to Islamic law.³⁵ A third document that Hazairin regarded as an "exit" from *receptie* theory in the area of inheritance was TAP MPRS No. II/1960, a decree

²⁸ Hazairin, *Hukum Kekeluargaan Nasional*, p. 9.

²⁹ Thalib, "Receptie in Complexu," p. 52. Hazairin, *Hukum Kekeluargaan Nasional*, p. 8; Hazairin, *Tujuh Serangkai Tentang Hukum*, p. 95.

³⁰ Hazairin, *Hukum Kekeluargaan Nasional*, p. 8.

³¹ Hazairin, "Negara Tanpa Penjara," p. 43.

³² Hazairin, *Hukum Kekeluargaan Nasional*, p. 10.

³³ The transliteration is taken from Saifuddin Anshari, "The Jakarta Charter of June 1945: A History of the Gentlemen's Agreement between the Islamic law and the Secular Nationalist in Modern Indonesia" (M.A. thesis, Institute of Islamic studies, McGill University, Montreal, 1976), p. 40.

³⁴ Lev, *Islamic Courts*, p. 198. Hazairin, *Hukum Kekeluargaan Nasional*, p. 10. Hazairin, *Demokrasi Pancasila* (Jakarta: Bina Aksara, 1983), pp. 56-9. The elements of Islamic law that he is referring to we found in article 29 of the Constitution of 1945.

³⁵ Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan No.1/1974* (Jakarta: Tintamas, 1986), p. 6.

passed by the People's Consultative Assembly as part of its eight-year plan.³⁶ Nevertheless, even with the above documents, a clean break from the effects of *receptie* theory had never actually been achieved, Hazairin claimed. What was needed to exit from *receptie* theory, he added was for Islamic law to be made binding upon Indonesian Muslims, both legally and institutionally, at the state level. Once Islamic law served as the positive law of all Indonesian Muslims, *receptie* theory would finally have been eliminated.

Hazairin's student, Sajuti Thalib (1929) later developed Hazairin's ideas by putting forward a theory that he called *receptie a contrario*.³⁷ According to him, after independence, there was no excuse for Dutch laws to continue to encumber the Indonesian people. In accordance with the Pancasila and the constitution of 1945, religious law ought to be the law of the nation's indigenous peoples. According to his understanding, customary law should be applicable to Muslims only if it did not contradict the provisions of Islamic law.³⁸ Thalib's theory was supported by the realities of the development of Islam in Java, Aceh, and Minangkabau, where Islamic law was applied by people as the living law, and customary (*adat*) law only insofar as it accorded with the provisions of Islamic law.³⁹ As the name of the theory itself indicated, Thalib has turned Hurgonje's theory upside down.

The theories of Van den Berg, Hurgonje, Hazairin and Thalib all had common perception of Islamic law as in some way playing the role of a positive law for all Indonesians. However, while Van den Berg was referring to a situation that actually existed, Hazairin and Thalib were making the case for its full implementation for Indonesian Muslims.⁴⁰

³⁶ This plan had admonished the government to pay attention to religious factors in establishing the new family law, once the *receptie* theory had been discarded. Lev, *Islamic Courts in Indonesia*, p. 198.

³⁷ This theory is often erroneously attributed to Hazairin. Thalib merely developed it based on Hazairin's idea. Thalib, *Receptio A Contrario*, p. 70.

³⁸ Ichtijanto, "Hukum Islam di Indonesia," p. 132. Thalib, *Receptio A Contrario*, p. 47.

³⁹ Ictijanto, "Pengembangan Hukum Islam di Indonesia," pp. 132-5.

⁴⁰ Akh. Minhaji, "Ahmad Hassan and Islamic Legal Reform in Indonesia (1887-1958)" (Ph.D diss., Institute of Islamic Studies, McGill University, Montreal, 1997), p. 60.

The Bilateral System

Before moving on to a discussion of Hazairin's ideas on the bilateral system it is necessary that we first provide a description of the Indonesian social system. What we will attempt to draw here is a general outline of the three most representative patterns, since discussing all the variations is impossible.

The Indonesian Social System

Given Indonesian's plethora of social systems and *adat* laws, we will limit our discussion to an account of a matrilineal, a patrilineal and a bilateral (parental) social structure and the characteristics of the *adat* laws that apply in each case. Our example of a matrilineal system is taken from the Minangkabau, where the female line of descent is preferred in matters of family authority and property. The patrilineal system is illustrated by the Batak, who favor the male line. Finally, there is the bilateral or parental system demonstrated in Javanese society, where no distinction is made between the male and female lines.⁴¹

The central genealogical group in the matrilineal family is formed by a mother and her children, whether sons or daughters, and then the children of the daughters alone.⁴² The lineage descent is drawn from the female line. The father does not belong to the household; rather, it is the mother's uncle who is responsible as guardian and who generally runs the affairs of the system,⁴³ holding a position on behalf of but outside the family. In other words, the father does not belong to the family of his wife because he is an outsider, and in fact still belongs to his own mother. The same is true of his wife's father and his own father, in fact of any male related by marriage. Similarly, grandsons and so on are not taken into account, as members of the family, while the sons of a brother belonging to one's sister-in-law are included.⁴⁴

⁴¹ Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, pp. 11-13. Lev, *Islamic Courts in Indonesia*, p. 91. Ter Haar, *Adat Law in Indonesia*, trans. E. Adamson Hoebel and A. Arthur Schiller (New York: Institute of Pacific Relations, 1948), p. 51.

⁴² Hazairin, *Hendak Kemana Hukum Islam* (Jakarta: Tintamas, 1976), p. 6. See also Govindan Unny, *Kinship Systems in Southeast Asia: A Study* (New Delhi: Vikas Publishing House, 1994), p. 5.

⁴³ Unny, *Kinship System*, p. 5.

⁴⁴ Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam Dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung, 1984), p. 232.

Thus even after marriage the husband remains a part of his own kinship group, although as an individual component of the marriage he is admitted to association with his wife's family. He is, in fact, taken from his clan and brought to the household of his wife. He nevertheless frequently "goes back to this mother's house during the daytime."⁴⁵ In contrast to the patriarchal pattern, where the women belong to the husband's family after a marriage, the women here remain within their own kinship group while the children belong to the mother's clan. Such is the situation among the Minangkabau and Kerinci.⁴⁶

The family and social system is formed in clans or *sukus* (tribes). To preserve the matrilineal system, the marriage system is exogamous. Endogamous marriage within the same clan or *suku* is strictly forbidden. Consequently, marriage to cousins (whether cross-cousins or parallel-cousins) is avoided.⁴⁷ Those who engage in this kind of marriage are normally considered to be outside the family and social system.

Again, in keeping with the matrilineal system in force, inheritance is strictly limited to females.⁴⁸ Males inherit practically nothing at all. The heirs are ranged on one side of the lineage, that is, the mother's lineage system, which Syarifuddin refers to by the term "unilateral matrilineal."⁴⁹ This is because the property inherited is collectively transferred to the daughters or the nieces from the female side without its being divided into smaller shares. The females benefit the estate on

⁴⁵ Ter Haar, *Adat Law in Indonesia*, p. 175. Unny, *Kinship System*, p. 16.

⁴⁶ The Minangkabau people are situated mainly on the West Coast of Sumatra, while the Kerinci are situated in the south part of Sumatra. Syarifuddin remarks that the word Minangkabau refers to a socio-cultural system rather than a specific region. Syarifuddin, *Pelaksanaan Hukum*, p. 122. Ter Haar, *Adat Law*, p. 168.

⁴⁷ A cousin is a relative descended from an uncle or aunt whether from the same grandfather or not. Cross-cousins are relatives when the mother of one and the father of the other are not in the same line of descendant. They have different grandparents. Parallel cousins are relatives when either their fathers or their mothers are in one line of descendants. Hazairin, *Hendak Kemana Hukum Islam*, pp. 4-5. This ban is similar to the case within the patrilineal system of Arab society, which prohibits marriage within the *'uṣba* (clan), Hazairin, *Hendak kemana Hukum Islam*, p. 12.

⁴⁸ Govindan, *Kinship System*, p. 3 and p. 19.

⁴⁹ In this system, the descendant is traced along the female side. Amir Syarifuddin, *Pelaksanaan Hukum*, p. 21.

behalf of family members, an arrangement which emphasizes collectivism rather than individualism. Thus women are considered as the sole eligible heirs, reflecting a social system where women are at the center of the matrilineal structure. If a family does not have any female members, this can lead to a breakdown in its structure.⁵⁰

In patrilineal society, the immediate genealogical unit generally consists of a father, sons, uncles and uncles' son.⁵¹ The family lives within the society, inhabits its own territory,⁵² and seems to distinguish itself from one sub-clan to another. In contrast to the matrilineal system, the patrilineal system operates along the male side. However, the system of marriage and inheritance, like that of the matrilineal system, is unilateral.

As in the matrilineal system, marriage in the patrilineal system is exogamous, a system which ter Haar calls "asymmetrical marriage."⁵³ Marriage to a woman or man within the clan or *marga* is considered marriage to a cousin, which is forbidden. Women and children furthermore belong to the husband's clan. The woman's tribe, after marriage, lies outside her own family and society.

Hence, inheritance in such a system is limited to the male side, whence the description "unilateral patrilineal." Women are not entitled to inherit any of the deceased's property.⁵⁴ The transmission of the property is here again collective, rather than individual.⁵⁵ As in the

⁵⁰ For more information on the Minangkabau inheritance system see for example, Franz Von Benda-Beckmann, *Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationship through Time in Minangkabau, West Sumatera* (The Hague: Martinus Nijhoff, 1979); Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung 1984).

⁵¹ J. C. Vergouwen, *The Social Organisation and Customary Law of the Toba Batak of Northern Sumatra* (The Hague: Martinus Nijhoff, 1964), p. 21.

⁵² Ter Haar, *Adat Law*, p. 65.

⁵³ Ter Haar, *Adat Law*, p. 65.

⁵⁴ By and large, the fact is that the distinctive characteristic of *adat* law is the exclusion of women from inheriting the deceased's property. This is true of many developing Muslim countries, especially patrilineal ones. J. Schacht, "*Mīrāth*," in C. E. Bosworth, E. Van Donzel, W. P. Heinrichs, ed., *Encyclopaedia of Islam*, vol. VII (Leiden: E.J. Brill, 1993), p. 111.

⁵⁵ For a further account of the Batak inheritance system see, for example; Herman Slaats and Karen Portier, *Traditional Decision-Making and Law: Institutions and Processes in an Indonesian Context* (Yogyakarta: Gadjahmada University Press, 1992); J. C.

matrilineal system, the system operates on behalf of the whole family and their interests. Its most important feature is perhaps that it maintains the patrilineal system within the family and society. The outstanding example of a patrilineal system at work in Indonesia is that of Batak society.⁵⁶

The male is the center of the family system. A family without son(s) is considered to be on the point of collapse; hence, sons are considered essential. Where there are no sons the family may adopt male children as substitutes, who acquire the same rights and responsibilities as true sons do. Accordingly, an adopted son inherits the estate of the father who adopted him.⁵⁷

The bilateral system, which is largely observed by the Javanese and Dayak people,⁵⁸ recognizes descent from both sides -- female and male, mother and father. The system of marriage may be either endogamous or exogamous. Because the family system does not form part of a clan or tribal system, marriage does not affect its structure. Indeed, marriage to cousins is not forbidden in bilateral society.

As far as inheritance is concerned, both sons and daughters inherit from either parent. If someone dies before his or her parents that person's children can inherit in his or her stead. This is also the case in matrilineal and patrilineal society (the Batak and Minangkabau), but the transmission of substitution in these cases follows the gender line, male or female.

In matrilineal society, the male occupies a subordinate position, with the paternal or agnatic relationship lying outside the tribal system of the society. In patrilineal society by contrast, women find themselves in an inferior position. The maternal or uterine relationship rests outside the structure of tribal ties and responsibilities. Under these circumstances the exploitation and preservation of the position

Vergouwen *The Social Organisation and Customary Law of the Toba-Batak of Northern Sumatra* (The Hague: Martinus Nijhoff, 1964).

⁵⁶ The Batak people dwell for the most part in the north of Sumatra island. Other societies with a patrilineal system include the Gayo and the Alas in Aceh, Ambon, Irian Barat, Timor and Bali in Eastern part of Indonesia.

⁵⁷ Koentjaraningrat, *Beberapa Metode Anthropologi Dalam Penyelidikan Masyarakat Dan Kebudayaan di Indonesia* (Jakarta: Penerbitan Universitas, 1958), p. 129; Vergouwen, *The Social Organization*, p. 281.

⁵⁸ The Javanese live mainly in the central and eastern regions of the island of Java. The Dayak people inhabit the western region of Kalimantan Island.

meant, *inter alia*, the exclusion of the female or male relative from inheritance and the enjoyment of a monopoly of rights of succession.

Hazairin's Bilateral System

Hazairin's bilateral system is based on the concept of a "bilateral system" in family and inheritance law. These laws represent something of an enigma within Indonesian society. His vision of a bilateral system was that the resulting Islamic law would be a combination of "divine law" and "local culture." It is within this framework that Hazairin sets forth his "bilateral system," since it represents the "divine message of the Qur'ān and the Sunna,"⁵⁹ on the one hand, and the needs of current Indonesian society, so rich in *adat* and culture, on the other.

When Islamic inheritance law came to be applied in Indonesian society, those deciding the cases were faced with the powerful influence of *adat* laws. Indonesian society is, after all, known to hold very strongly to *adat*.⁶⁰ In other words, Islamic inheritance rules were not fully accepted. One other reason for the difficulty may have been the terms under which Islam spread in Indonesia, which did not give much weight to *shari'ā* based interpretations of the family and the inheritance system.⁶¹ As a result, cases of inheritance became increasingly complicated for Muslims in Indonesia.⁶² Even today, in

⁵⁹ The word Sunna in this context has the same meaning as *ḥadīth* in that it represents the body of legal notions handed down from the Prophet.

⁶⁰ It is understandable that Indonesian Muslims should adhere so strongly to *adat* and older traditions. Since it was through *taṣawwuf* that local people were first converted to Islam. Even the new teachings were given new meaning and importance. Howard M. Federspiel, *Persatuan Islam: Islamic Reform in Twentieth Century Indonesia* (Ithaca: Cornell Modern Indonesia Project, 1994), p. 2; Deliar Noer, *The Modernist Muslim Movement in Indonesia 1900-1942* (Singapore: Oxford University Press, 1973), p. 12; Benda, *The Crescent and the Rising Sun*, p. 12; William R. Roff, "Southeast Asian Islam in the Nineteenth Century," in P. M. Holt, Ann K. S. Lambton, and Bernard Lewis (eds), *the Cambridge History of Islam*, vol. 2. (Cambridge: Cambridge University Press, 1970), pp. 155-6.

⁶¹ The *Shari'a* (Islamic law) is believed to have had less influence in the spread of Islam in Indonesia, so it makes little sense to argue that Islamic inheritance law is commonly accepted there. Cf. G. W. J. Drewes, "Indonesia: Mysticism and Activism," in G. E. von Grunebaum (ed.), *Unity and Variety in Muslim Civilization* (Chicago: University of Chicago, 1955).

⁶² Lev observes that inheritance laws in Indonesia are confusing and have invited "intricate and lively debate among legal professional and political activists." Lev, *Islamic Courts in Indonesia*, p. 185. Current research shows that inheritance cases are still resolved in different ways. Some apply the rules of Islamic inheritance, while some

cases of inheritance, there is still considerable doubt as to where *adat* law ends and Islamic law begins.

In such circumstances, according to Hazairin, human beings had to exercise their own judgment to determine the appropriate course of action in applying Islamic law.⁶³ This inevitably involved *ijtihad*, of which Hazairin was a staunch advocate. Supporting what he called *neo-ijtihad*, he believed that the notion that the gate of *ijtihad* has opened wide arose because people had lost their trust in the mercy of God or “*rahmat Allāh*.”⁶⁴

Ijtihad as an interpretive method was becoming the preferred means to revise Islamic traditionalist thought in the light of changing circumstances. Consequently, Hazairin determined that *mujtahids* in Indonesia were needed to meet the demand of *neo-ijtihad*. A new class of *mujtahids* could be created through Islamic educational reform based on the teachings of the Qur’ān.⁶⁵ Islamic institutions could produce *mujtahids* able to interpret the Qur’ān and *Ḥadīth* in accordance with the needs of society.⁶⁶ In this respect Hazairin held a view about the formulation of new laws much different than those of modernist reformers since he saw society as the primary institution to be served while most other reformers were interested simply in applying Islamic law. It was a matter of approach.

apply the rules of *adat* inheritance. In many cases people mix Islamic and *adat* practices. For example, see the research in *Laporan Hasil Penelitian Tentang Pelaksanaan Pewarisan di Kalangan Orang-orang Islam di Beberapa Daerah di Jawa Tengah* (Semarang: Lembaga Penelitian, Pengembangan dan Pengabdian Masyarakat IAIN Walisongo, 1982/1983); see also Institut Agama Islam Negeri Sumatera Utara, *Laporan Study Kasus Hegemonitas Keluarga dan Keragaman Beragama dalam Masyarakat Batak Karo* (Jakarta: Proyek Kerukunan Hidup Beragama, Depag RI, 1980).

⁶³ Hazairin, *Hendak Kemana Hukum Islam*, p. 18.

⁶⁴ Hazairin, *Hukum Islam dan Masyarakat* (Jakarta: Bulan Bintang, 1960), p. 16. See also, Hazairin, “Ilmu Pengetahuan Islam dan Masyarakat,” in Hazairin, *Tujuh Serangkai Tentang Hukum*, p. 115.

⁶⁵ Hazairin, *Hukum Islam dan Masyarakat*, pp. 18-20. Hazairin, “Ilmu Pengetahuan Islam dan Masyarakat,” in Hazairin, *Tujuh Serangkai Tentang Hukum*, pp. 109-20. He was convinced that reform through the efforts of the *mujtahids* depended in the first place on educational improvement. That is why he embarked on establishing an Islamic University.

⁶⁶ Hazairin, *Hukum Islam dan Masyarakat*, pp. 17-9. See also his *Hukum Kewarisan Bilateral Menurut al-Qur’an dan Hadith*, p. 61. Nur Ahmad Fadhil Lubis, “Islamic Legal Literature and Substantive law in Indonesia,” *Studia Islamika*, 4, 3 (1997), p. 54.

Despite the fact that *ijtihād* has had a problematic history,⁶⁷ Hazairin sought to institutionalize it so that new *mujtahids* would be qualified not only in religious knowledge but in modern science as well. This was in order that *ijtihād* should be able to answer the needs of contemporary society. Hazairin argued that performing *ijtihād* was a social responsibility.⁶⁸

Hazairin offered a socio-anthropological interpretation of the Qur'ān aimed at showing its compatibility with society's needs. He insisted that Islam, as a body of teaching, has not as yet been finalized or made definitive. Islam is constantly open to reinterpretation in accordance with new demands and developments. He came to the conclusion that Qur'ānic laws may be applied in any part of the world, as long as one does not rely on *taqlīd*⁶⁹ with respect to the classical '*ulamā*' who had conducted their *ijtihād* more than a thousand years ago. According to Hazairin we should conduct our own *ijtihād* of the Qur'ān and *Ḥadīth* in a manner compatible with current social conditions and in accordance with justice.

Hazairin simply took upon himself the task of exercising *ijtihād* in an effort to develop "bilateral system," which he admitted to be the product of his "personal *ijtihād*." The system that he proposed was one that he considered ideal for any family and society, although he may have been drawing on some Indonesian models. The consequence of a bilateral system, he realized, would be nothing less than the collapse of the clan system in Indonesia. Since the system would completely transform the family and social system of Indonesian society by making it into one, uniform system. Hazairin referred to it as a "*revolusi sosial*."

⁶⁷ The problem of the gate of *ijtihād* has been intensely discussed to this day by scholars. Hallaq, for example, has discussed this in "The Gate of Ijtihād: A Study in Islamic Legal History" (Ph.D. diss., University of Washington, 1983). See also Wael B. Hallaq, "Was the Gate of Ijtihād Closed?" *International Journal of Middle East Studies* 16 (1984): pp. 3-41. Hallaq's contribution to the debate is analyzed in Michel Hoebink's *Two Halves of the Same Truth: Schacht, Hallaq and the Gate of Ijtihad an Inquiry into Definition into Definition* (Amsterdam: MERA, Middle East Research Associates, 1994).

⁶⁸ Hazairin, "Ilmu Pengetahuan Islam dan Masyarakat," in Hazairin, *Tujuh Serangkai Tentang Hukum*, pp. 115-116.

⁶⁹ *Taqlīd* means to depend on the legal interpretations of recognized scholars without oneself examining the process by which that interpretation was reached.

The “bilateral system” would be acceptable for several reasons in his eyes. First, it would not be opposed to any religious law. Here, regrettably, Hazairin did not explain how and why this would have been the case. Second, the system was in accordance with what the Qur’ān intended. The Qur’ān, he insisted, is “anti-unilateral society” and preferred a bilateral system of society. Basing himself on the verses in the Qur’ān concerning marriage and inheritance,⁷⁰ Hazairin concluded that *adat* practices in marriage and inheritance among Indonesians that were unilateral in nature, were non-Qur’ānic.⁷¹ Hazairin remarks, “I am sure that the Qur’ān only blesses societies which are bilateral.”⁷²

Third, the system would lead to the disappearance of clans, and all that this would entail.⁷³ Hazairin’s training in *adat* law led him to the conclusion that external factors, such as modernization and urbanization, would change society from a “non-bilateral” into a “bilateral society.” He predicted that women would favor the bilateral system at an early stage in their emancipation. This would also lead to gender equality in family and social systems, and consequently equal inheritance rights for the male and female lines. Hazairin saw social change as hastening this adoption of a bilateral system and concluded that Islam supported it.⁷⁴ Hazairin embraced this process as a leading motivation behind achieving the Qur’ānic goal of unifying society in a “bilateral system.”

Basing himself further on a method of understanding the Qur’ān which he defined as “*tafsir yang otentik*” (authentic interpretation)⁷⁵—i.e., the interpretation of the Qur’ān using modern science—Hazairin used a socio-anthropological approach he had developed himself. He

⁷⁰ In defining inheritance, one cannot escape the question of marriage law, for inheritance rests upon the two principal grounds of marriage and blood relationship. N. J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), p. 10.

⁷¹ Hazairin, *Hendak Kemana Hukum Islam*, pp. 12-3.

⁷² Hazairin, *Hukum Kekeluargaan Nasional*, p. 5.

⁷³ Hazairin, *Hukum Kewarisan Bilateral menurut al-Qur’an dan Hadith*, p. 1; Hazairin, *Hukum Kekeluargaan Nasional*, p. 4; Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan*, pp. 18-19.

⁷⁴ Lev, interview by author, 13 May 1999, Montreal, tape recording, Quality Hotel, Montreal.

⁷⁵ Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur’an dan Hadith*, p. 3 and p. 63.

concluded that the system favored by the Qur'ān is *bilateral sui generis*.⁷⁶ This meant a "bilateral system unique to the Qur'ān," not the bilateral system currently in existence.⁷⁷ Accordingly, Hazairin interpreted the marriage and inheritance verses of the Qur'ānic as a unit. The result was that every interpretation of the marriage verses was linked to the inheritance verses.⁷⁸

Hence, the traditional interpretations of the Qur'ān were not to be taken as binding upon modern Muslim societies. Hazairin offered a new interpretation of the social system which he believed was intended by the Qur'ān. The concept of "bilateralism" needed to be explained in exegetical terms which transformed it into social practice. The verses treating specifically of marriage and inheritance are IV: 23 and 24, IV: 11, 12 and 176.⁷⁹ Hazairin, for example, considered verse IV: 23: "Prohibited to you (for marriage) are your mothers, daughters, sisters; father's sisters, mother's sister...except for what is past, for Allāh is Oft-Forgiving, Most Merciful," and verse IV: 24: "Also prohibited are women already married, except those whom your right hands possess, thus that Allāh ordained (prohibitions) against you: except for these, all others are lawful..." For Hazairin, these verses had no resemblance to the marriage system then being practiced in Indonesian Muslim society. For instance, the phrase from verse IV: 24 "...except for these, all others are lawful"⁸⁰ (*wa uḥilla lakum mā warā'a dhalikum*) indicates that marriage to cross-cousins and parallel-cousins is not forbidden. The Qur'ān thus challenges the marriage system of

⁷⁶ Hazairin, *Hendak Kemana Hukum Islam*, p. 14. Anwar Harjono, "Hukum Kewarisan Bilateral menurut al-Qur'an: Komentari Singkat Atas teori Prof. Hazairin," in Sajuti Thalib, *Pembaharuan Hukum Islam*, p. 67.

⁷⁷ For example, the bilateral system of inheritance among the Javanese, according to Hazairin, does not entirely reflect the Qur'ānic version for in some cases women are excluded from marriage and inheritance cases. As a clear illustration of this witness the marriage known as *maggih koyo* (a practice of polygamy), in which the second and the next wife are not considered as a part of the family and do not have rights to their husband's property. Hazairin, *Hukum Islam dan Masyarakat*, 17.

⁷⁸ Since inheritance is so closely linked to marriage practice, any discourse on one topic must consider the other. Inheritance is rooted in the family system, and the family system is rooted from the marriage system, and both will influence the social system. Hazairin, *Hendak Kemana Hukum Islam*, p. 14.

⁷⁹ All translations of the Qur'ān verses in this thesis are taken from 'Abdullah Yūsuf 'Alī, *The Meaning of the Holy Qur'ān* (Brentwood: Amana Corporation, 1994).

⁸⁰ "Except for these" means except for all women who are forbidden to marry.

unilateral society, whether patrilineal such as among the Batak, or matrilineal as among the Minangkabau, with their prohibition on marriage between cousins.

Hazairin furthermore argued that there is no abrogation⁸¹ in the Qur'ān. Accordingly, all verses in the Qur'ān should be taken as guidance.⁸² The Qur'ān should moreover be understood to be comprehensive, and all its parts interrelated. Basing himself on this notion, Hazairin maintained that the idea of abrogation is rejected by the Qur'ān itself. The Qur'ān III: 7; II: 85; and IV: 82 are, according to Hazairin, verses that reject the idea of abrogation.⁸³ There is not a single verse that is abrogated by another verse.

Ḥadīths function as a supplement to the Qur'ān and are therefore indispensable to the Qur'ān's interpretation. Hazairin believed that *Ḥadīths* do not contradict the Qur'ān and that the inheritance *ḥadīths* should be interpreted in concert with the Qur'ān, even if this had not always been the case. *Mujtahids* in classical times evaluated *Ḥadīths* on the basis of their *isnād* (chain of transmitters) rather than on their *matn* (the content of the text). While the *matn*, according to Hazairin, conveys no absolute meaning, it is often interpreted without regard for the contextual meaning of the Qur'ānic verses, and often with a patrilineal bias.⁸⁴

Of course Hazairin still recognized that certain verses on inheritance appear to argue for a "less than gender-equal social

⁸¹ Abrogation represents the term *naskh* in Arabic. One use of this term is as a technical term used by Islamic scholar to designate a variety of alleged 'phenomena' discussed in the area science of *uṣūl al-fiqh*. The 'phenomena' had a general basis in the concept of replacement earlier sources by the latter sources. The term *naskh* does not only denote a single theory concerned with problems of Qur'ān but also of *ḥadīth*. The implications for the operation are three. First is replacement the *ḥukm* (legal consequences) and the text. Second is replacement the *ḥukm* only and third is replacement the text only. The result is the abrogated (earlier sources) is no longer valid. For detailed information see, Abū 'Ubaid al-Qāsim bin al-Sallām, *Kitāb al-Nāsikh wa al-Mansūkh*, trans. E. J. W. Gibb Memorial, ed. John Burton (England: E.J.W. Gibb Memorial Trust, 1987), pp. 1-42. See also Ibn al-Qaṣṣār, *al-Muqaddima fī al-Uṣūl* (Beirut: Dār al-Gharb al-Islāmī, 1996)

⁸² Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, p. 63.

⁸³ Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, p. 63 and pp. 86-7.

⁸⁴ Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, p. 75. Hazairin's argument here is about the *ḥadīth* of Ibn 'Abbās on *'aṣaba* (agnatic relatives). This is will be examined more closely in the third chapter of this thesis.

system,” given that they stipulate double the share for males as compared to females. But even here he sees extenuating circumstances that need reinterpretation. Much of his detailed analysis of the issue pertains to cases of inheritance involving such issues as ‘*aṣabah* (agnatic relative), *kalālah* and orphaned grandchildren,⁸⁵ for these three issues are directly related to the problem of the Islamic and *adat* inheritance laws of Indonesian society.

Hazairin attempted to create a new and solid system, which differed from the traditional one. He discarded the tradition of applying *naṣṣ* (legal basis from either Qur’ān or Ḥadīths) to practical cases, and grounded them in considerations of socio-cultural benefit. This practice, according to him, would be guided by “*tambal-sulam*” (providential) activity.⁸⁶

He argued that the bilateral inheritance system operated on general and universal principles, most notably the principle that both females and males inherit property, and that daughters and sons have equal rights to the property of their parents.⁸⁷ Hazairin is believed to have been the first legal authority to put forward an Indonesian “sense of justice” (*rasa keadilan*) and ethics, particularly with respect to the gender bias in the transmission of property and within the discussion on Indonesian *maṣlaḥah* in Islamic reform.⁸⁸

In addition to the Qur’ān and those provisions of the Ḥadīths pertaining to the theory of bilateralism, Hazairin recognized the need to use *qiyās* (analogy). He drew his own analogy between what the classical *mujtahids* did in the past and what *mujtahids* had to do today. If classical *mujtahids* performed *ijtihād* according to the needs of their society, then modern-day *mujtahids* are entitled to perform *ijtihād* in the same way, as long as *maṣlaḥah*, ethics and justice are taken into consideration.⁸⁹

⁸⁵ These analyses will be explained in chapter three of this thesis.

⁸⁶ John R. Bowen, “Qur’ān, Justice, Gender: Internal Debates in Indonesian Islamic Jurisprudence,” *History of Religions* 38/1 (1998), p. 69. *Tambal sulam* activity here, according to Hazairin may be defined as an activity of interpretation of the Qur’ān relating to social conditions and vice-versa.

⁸⁷ Hazairin, *Hukum Kekeluargaan Nasional*, p. 4.

⁸⁸ Bowen, “Qur’ān, Justice, Gender,” p. 68.

⁸⁹ Hazairin, *Hukum Islam dan Masyarakat*, p. 14-5.

Hazairin also saw the relationship between law and social change a dynamic one. He believed that, when times change, the law must also change. Hazairin's conclusions anticipated June Collier's assertion that: "at the same time that we attempt to analyze other societies, however, we must examine our own. As thinkers, we are products of our time and situation...."⁹⁰ In its historical development, Islamic law alone recognized this dialectic whereby the law changes and adapts to time and place (*sālih li kull zamān wa-makān*).⁹¹

Thus, Hazairin tried to reform not only Indonesian *adat* inheritance rules but Islamic inheritance law as well. In addition to introducing uniformity into *adat* inheritance systems on the one hand, he wanted to reform on the other, certain aspects of the classical Islamic inheritance system by reinterpreting the Qur'ān. As a matter of fact, some recent studies point to similar moves in this direction, such as Kimber's "The Qur'ānic Law of Inheritance"⁹² and Carrol's "Orphaned Grandchildren."⁹³

It is easy to see that his formal training as a professor of *adat* law had a great impact on his mode of analysis, and that it caused him to read the Qur'ān and the Sunnah in a new light. He also drew heavily on the social sciences, particularly *adat* law and ethnology. His analysis then was a unique interpretation of the Qur'ān and the Ḥadīths in particular, and of law as a comprehensive system in general. Although Hazairin humbly claimed that his work was no more than a contemporary reading of the Qur'ān, being in no way an exegetical or a

⁹⁰ June Collier, "Legal Process," *Annual Review of Anthropology* 4 (1975), pp. 135-6.

⁹¹ Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), p. 248. Flexibility is valued in Islam itself, the early scholars recognized it through *qā'ida* by way of "al-*ādah al-muḥākama*" or "*Mughayyiruh al-ḥukm tataghayyur al-'azminah wa al-amkina*." Shāfi'ī himself had two sets of opinions, *qaul qadīm* and *qaul jadīd*, reflecting the influence of different places and times, the former when he was in Baghdad and the latter when he was in Egypt. This was commonplace among the classical 'ulamā'. N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964), p. viii; N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), pp. 20-5.

⁹² Richard Kimber, "The Qur'ānic Law of Inheritance," *Islamic Law and Society* 5 (1988), pp. 291-325. Here Kimber proposes a new interpretation of the relevant texts and examines the inheritance system in the light of its classical interpretation.

⁹³ Lucy Carrol, "Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan," *Islamic Law and Society* 5 (1988), pp. 409-47.

legal work, his thought reflects considerable depth and range, and stands apart from other modern treatments of the subject.

Hazairin claimed that when the Islamic law of the classical '*ulamā*' is applied in a certain society there is no guarantee that it will fit, since each society has its own culture. *Adat* law, as a product of that culture, is therefore certain to have an influence on the provisions arrived at so long ago by these '*ulamā*'. This can be seen from the development of Islamic inheritance law, which was itself influenced by pre-Islamic Arab practices.⁹⁴ If this theory is valid, it demonstrates that the Islamic law contained in the Qur'ān is flexible enough to be interpreted in any society. The interpretation of the Qur'ān as a divine law must meet the needs and reflect the culture of a society. Thus, Hazairin's interpretation of the Qur'ān showed how the Qur'ān can be interpreted as long as there is no deviation from the Qur'ān itself.⁹⁵

Hazairin, furthermore, was fully aware of Indonesia's social problems and the values inherent within its different cultures. He saw these problems as being rooted in the confusion over the respective applications of *adat* law. Hazairin therefore took both Islamic and *adat* legal values into consideration. He saw it as important to begin any social engineering with legal reform. He tried to develop a hypothesis on the basis of a comparison of Indonesian and Arab social conditions, given that Islamic law had first been formulated in the latter context. He came to the conclusion that his bilateral system could provide a way out of the social complexity that Indonesia faced. But to do this, Islamic law had to be incorporated at the state level.

⁹⁴ The system of '*asaba*' in Islamic inheritance law, for example, is believed to have been heavily influenced by the rules of pre-Islamic Arab family structure. N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), pp. 8-11. Abdullah Syah, *Integrasi antara Hukum Islam dan Hukum Adat dalam Kewarisan Suku Melayu di Kecamatan Tanjung Pura* (Jakarta: Badan Penelitian dan Pengembangan Departemen Agama RI, 1980), pp. 38-9. See also Lev, *Islamic Courts*, p. 219; Reuben Levy, *the Social Structure of Islam* (Cambridge: Cambridge University press, 1962), pp. 147-149.

⁹⁵ *Nas* (the Qur'ān and *ḥadīth*) contains an eternal message which is adaptable to any time and any place. Amiur Nuruddin, *Ijtihād 'Umar Ibn al-Khattāb: Studi Tentang Perubahan Hukum Dalam Islam* (Jakarta: Rajawali Press, 1987), p. xv and p. 170.

Hazairin's Impact and Contribution towards the Indonesian Legal System

Perhaps the most significant impact of Hazairin's reformist vision has been on his students and friends. Many of Hazairin's students became the leading architects of *fiqh* reform in the 1980s and 1990s. These include many of today's older generation of law professors and Supreme Court justices, many of whom draw on Hazairin's arguments in advocating current reforms. For example, Sajuti Thalib, in advocating his *receptio a contrario* theory, has clearly followed Hazairin's footsteps. He has sought to preserve and elaborate Hazairin's "*receptie exit* theory" and launched the "*receptio a contrario* theory" as a continuation of his teacher's theory.

Bowen compares Hazairin's argument regarding cultural differences with Madjid's later argument about historical differences.⁹⁶ He says that both are similar to Rahman's claim of eternal versus specific rules in the Qur'an. Although Madjid's scholarship was clearly influenced by that of Rahman, according to Bowen, it may have been shaped by Hazairin's writings as well. An interesting feature of the latter's writing is the concurrence of religious historical scholarship, largely following in Hazairin's footsteps. The proponents of each are not entirely aware of the convergence; Madjid views the jurist as somewhat too concerned with Islamic law, while jurists see Madjid as too little concerned with the legal status of the scriptures. Hazairin may be credited with laying the legal framework onto which the later historical arguments developed by way of Rahman's ideas were to be fitted.

In proposing the idea of creating a national *madhhab*, Hazairin distinctively paved the way for the Hasbi's "Indonesian *fiqh*," which later became a major phenomenon.⁹⁷ Both attempted to place their respective works within a social and historical context. In terms of the textual background, however, Hasbi's approach was quite different, in

⁹⁶ In his scholarship, Nurcholish Madjid has examined many of Rahman's ideas, especially on contextualization. Nurcholish Madjid, "Sejarah Awal Penyusunan dan Pembakuan Hukum Islam," in Budhy Munawwar-Rahman ed., *Kontekstualisasi Doktrin Islam dalam Sejarah* (Jakarta: Paramadina, 1994), pp. 237-250.

⁹⁷ For more information on Hasbi's Indonesian *fiqh* see for example Yudian W. Asmin, "Hasbi's Theory of *Ijtihād* in the Context of Indonesian *Fiqh*" (M.A. thesis, Institute of Islamic Studies, McGill University, Montreal, 1993). See also Nurouzzaman ash-Shiddiqiey, *Fiqh Indonesia: Penggagas dan Gagasanannya* (Yogyakarta: Pustaka Pelajar, 1997).

that he emphasized the role of Ḥadīths, while Hazairin's approach relied much more on the Qur'ān. Hazairin moreover is believed to have been the first to call for the establishment a *madhhab* with an Indonesian character, although some would dispute this. His proposal was clearly set out in a speech given in Jakarta in 1951:

The new *madhhab* that I have named a "*madzhab nasional*" (National *madhhab*) is not exactly proper, because the term "national" applies to all citizens of Indonesia, while Indonesian Muslims are only part of them." The name – *madzhab Indonesia* (Indonesian *madhhab*) offered recently by M. Hasbi Ash-Shiddiqy, is more appropriate.⁹⁸

Although some scholars regard Hasbi as the initiator of the *madzhab Indonesia*, from the statement above it is clear that Hazairin's proposal preceded Hasbi's.⁹⁹ Moreover, Hazairin's ideas on the framework of Indonesian *fiqh* or a national *madhhab* seem to have been more systematic than those of Hasbi.¹⁰⁰ Hazairin had discovered some of the real problems faced by Indonesian Muslims in applying Islamic family law. He offered a way out through the bilateral system, in view of the diversity of the social systems in the country. Finally, he offered some clear interpretations of the problem in the interests of reform. Lubis notes by the way that it was Hasbi who, in 1961, revived the idea without mentioning Hazairin's earlier views on creating a national *madhhab*.¹⁰¹

From the government came a call to reform Islamic law (*fiqh*). The government emphasized the importance of creating a unified legal system to ensure greater ideological and political control over social and political institutions.¹⁰² But it was also responding to those Muslim reformers, including Hazairin, who called for stricter application of Islamic law in the broader framework of a national *madhhab*.

⁹⁸ Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas, 1982), pp. 5-6.

⁹⁹ Yudian Wahyudi, "Hasbi's Theory of *Ijtihād*," p. 1.

¹⁰⁰ This may have had something to do with the educational level that each had attained. Hazairin for instance had obtained a doctorate, whereas Hasbi graduated only from the *pesantren*, equivalent to senior High School level. Another reason is that Hazairin was an anthropologist, and had distinctive skills, both methodological and theoretical, to bring to the study of legal institutions. Rene R. Gadacz, "Foreword," in *Towards An Anthropology of Law in Complex Society* (Calgary: Western Publishers, 1982).

¹⁰¹ Lubis, "Islamic Legal Literature," p. 54.

¹⁰² Bowen, "Qur'ān, Justice Gender," p. 56.

Implementation of the national *madhhab* suggested by Hazairin has brought about significant constitutional amendments. His contribution to the application of Islamic law at the state level may clearly be seen in the Marriage Law No. 1/1974, the Islamic Court Law of 1989, the Compilation of Islamic Law of 1991 and the foundation of BAZIS or Badan Amil Zakat, Infaq dan Shadaqah (Supervisory Body of *Zakāh*, *Infaq* and *Ṣadaqah*).

The Marriage Law, decreed in 1974, shows how Hazairin's idea of a bilateral system was incorporated into statute. Article 41, for example, reads: "the consequences of dissolution of a marriage on account of divorce are as follows: the mother as well as the father shall continue to have the responsibility of maintaining and educating their children...The father shall be accountable for all expenses relating to the maintenance and the education needed by the children; in the case of the father being in fact unable to discharge his responsibility a court of law may decide that the mother share the burden of expenses referred to."¹⁰³ According to Hazairin, the article stipulates bilateral responsibility and changes the function of husband and wife. It had the effect, for instance, of altering the patrilineal system among the Batak, just as it did the matrilineal bias that prevailed among the Minangkabau, for whom husbands were only a complement of the family.¹⁰⁴ The marriage law therefore sought to benefit both husband and wife.

In 1973, a year before the marriage law was implemented Hazairin published a commentary on it.¹⁰⁵ Suggesting very few changes, he supported the bill. The implementation of this bill caused him to be optimistic regarding the development of the legal system. According to him, the bill guaranteed marriage and inheritance laws and maintained the function of the Islamic courts.¹⁰⁶ It radically changed, moreover, social conditions by instituting a bilateral system. The *'uṣbah* tradition or single reference line of descent in marriage and inheritance law was

¹⁰³ See, Marriage Counseling Bearau, *the Indonesian Marriage Law* (Jakarta: Department of Religion Affairs, 1988), p. 22.

¹⁰⁴ Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan Nomor 1-1974* (Jakarta: Tintamas, 1986), pp. 18-9.

¹⁰⁵ See Sajuti Thalib, *Hukum Kekeluargaan Indonesia* (Jakarta: Universitas Indonesia, 1986), pp. 163-7, as he quoted from Harian KAMI (KAMI daily), September 18, 1973.

¹⁰⁶ Thalib, *Hukum Kekeluargaan Indonesia*, p. 163.

automatically transformed into a bilateral system. Hazairin's goal was to institutionalize the bilateral (parental) system in family law in order to achieve a homogenous law for Indonesian Muslim.¹⁰⁷

Hazairin furthermore argued that the Marriage Law No. 1/1974 was a clear example of *neo-ijtihad* or *authentic* interpretation (*tafsir yang otentik*).¹⁰⁸ What he meant by this was that the marriage law in Indonesia had moved from being based officially on *adat* law to allowing for Islamic provisions.¹⁰⁹ This new law terminated *adat* marriage rules, except their ceremonial components. The Marriage Law also provided a new national law, applicable to Indonesian citizens as a whole.¹¹⁰ Those who followed Islam and other religions were to be allowed their own laws of marriage.¹¹¹

Hazairin's tireless attempts to lay the groundwork for his idea of a bilateral social system through reform of inheritance law led to significant improvement in the family and property law of Indonesian society. Although some of his ideas had been anticipated in the Madjelis Permusjaratan Rakjat Sementara decree of December 3, 1960, many of Hazairin's suggestions regarding a bilateral system were clearly reflected in the Compilation of Islamic Law enacted in 1991. The Compilation of Islamic Law contains three books. Book I constitutes the Marriage Law, Book II the Inheritance Law, and Book III the *Waqf* (endowment) Law. Of course Hazairin's intention was to institutionalize Islamic law, especially in marriage and inheritance, and this was accomplished in this compilation. Some elements of his thought were incorporated into the compilation, for example, in the case of orphaned children and their right to inheritance, as Muhammad Daud Ali explained. Article 185 reads, "whenever an heir dies before the deceased, his place is taken by his children. Their share may not exceed the share of those for whom they substitute."¹¹²

The implementation of the Marriage Law and the Compilation of Islamic Law has had a further impact in that it has met the demands of

¹⁰⁷ Hazairin, *Hukum Kekelurgaan*, p. 3.

¹⁰⁸ Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan*, p. 9.

¹⁰⁹ Ibid., p. 5.

¹¹⁰ Ibid., p. 1.

¹¹¹ Ibid., p. 3.

¹¹² Departemen Agama R. I., *Kompilasi Hukum Islam* (Jakarta: Departemen Agama RI, 1991/1992), p. 95.

women's groups and jurists that legal steps are taken to give women equal rights to divorce and legal resources.¹¹³ Similarly, through these statutes women have achieved greater property rights both in divorce and inheritance.

In 1989 the government attempted to expand the jurisdiction and augment the enforcement powers of the Islamic courts, even as this and other laws rendered the Indonesian system more integrated and subject to state supervision. Islamic courts now exist alongside general courts; and the decisions of judges are subject to Indonesian Supreme Court review. While Article 10 of the Constitution of Judicial Affairs (or Undang-undang Pokok Kekuasaan Kehakiman No. 14/ 1970) had led to the establishment and development of Islamic courts in Indonesia,¹¹⁴ Hazairin's contribution was in unifying the Islamic court's competence in Java, Madura and Kalimantan where previously it had taken a back seat to differences.

In 1991 the government focused its attention on the *zakāh* (alms) system. An institution was formed to organize its collection and that of other alms as well. Decrees of the Minister of Religious Affairs and Internal Affairs Nos. 29 and 47/1991 led to the foundation of BAZIS under state management.¹¹⁵ The function of this body is to govern the collection and redistribution of *zakāh* proceeds according to the needs of Indonesian Muslims from the district to the central level. The establishment of BAZIS represented an attempt on the part of the government to redress the economic problems faced by Indonesian Muslims. Hazairin's responsibility in its foundation may have been minor, but it is no coincidence that it answered many of the concerns that he had expressed regarding the need to institutionalize the economic infrastructure of the Muslim community.

Lev argues that Hazairin's ideas and suggestions regarding social change within Indonesian society were obviously written in response to the demands of Indonesian Muslims. The evolution of unilateral societies (the Batak and the Minangkabau) which have changed in respect to modernization and urbanization show that Hazairin's

¹¹³ Bowen, "Qur'ān, Justice Gender," p. 56.

¹¹⁴ Sajuti Thalib, *Hukum Kekeluargaan di Indonesia Berlaku Bagi Umat Islam* (Jakarta: Yayasan Penerbit Universitas Indonesia, 1974), p. 163.

¹¹⁵ Departemen Agama RI., *Pedoman Pembinaan Amil Zakat, Infaq dan Shadaqah* (Departemen Agama RI, 1992), pp. 107-31.

prediction that society will change and *adat* law with it was an astute one. This also can be seen especially in the decisions of Islamic Courts where family law is interpreted in ways that reflect Islamic principles at the expense of *adat* customs. Islamic law therefore had an influence caused by social changes. And Hazairin affirmed that it is only Islamic law that can give a certainty, for when society changes, the *adat* law also changes.¹¹⁶

The government furthermore has tried to introduce other measures. For example, to overcome the problem of inheritance in Minangkabau, the authorities have, in addition to instituting Islamic property law, introduced the concept of *hibah* (gift), which has helped in the Islamization of social processes there.

The conflict of the *adat* and Islamic inheritance systems was resolved by the use of *hibah* in that it allows children (sons and daughters) to receive property from their father, which was not the case previously. As Bowen notes, based on his research on contemporary Indonesian jurisprudence deeply rooted local practice restricts the share of inheritance as *hibah* which is limited to one-third of the property. This suggests that *hibah* is regarded as an impediment to the Islamization of social life in coping with traditional property, for this rule may also be explained as having been motivated by local social norms.¹¹⁷ The extent of Hazairin's contribution in this area is unclear, but it can be said with confidence that it was his views that facilitated its introduction.

Conclusion

Much has been done in the legal field to redress social disparities in Indonesia. This has led to the introduction of new elements of Islamic law into the national constitution in an effort by Islamic jurists and leaders, together with the government, to establish *maṣlaḥah* with an Indonesian character. We cannot deny that Hazairin was a major force behind this trend.¹¹⁸ []

¹¹⁶ Lev, interview by author.

¹¹⁷ John R. Bowen, "You May Not Give it Away: How Social Norms Shape Islamic Law in Contemporary Indonesia Jurisprudence," *Islamic Law and Society* 5/3 (1998), p. 382. This policy, Bowen adds, appears to take a step backward, because it limits, rather than expands the authority of a Muslim in regard with the wealth. Bowen, "You May not give it Away," p. 386. Compared to this policy, Hazairin's bilateral system is more advanced because it gives Muslims more authority over property matters.

¹¹⁸ Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan*, p. 27.

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